No. 84-978

In the Supreme Court of the United States

OCTOBER TERM, 1984

EXXON CORPORATION, ET AL., APPELLANTS

v.

ROBERT HUNT, ADMINISTRATOR OF
NEW JERSEY SPILL COMPENSATION FUND, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a provision of the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund), 42 U.S.C. 9614(c), preempted the previously enacted New Jersey Spill Compensation and Control Act, N. J. Stat. Ann. §§ 58:10-23.11 *et seq.*

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The Solicitor General submits this brief in response to the Court's order inviting a brief expressing the views of the United States regarding this appeal.

STATUTES INVOLVED

We follow the nomenclature adopted by the parties and the courts below. Accordingly, "Superfund" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, enacted by Congress on December 11, 1980, and "Spill Fund" means the New Jersey Spill Compensation and Control Act, N.J. Stat. Ann. § 58:10-23.11 *et seq.* (West 1982), enacted on January 6, 1977, and thereafter amended.

Superfund

Section 114 of Title I of "Superfund", 42 U.S.C. 9614, provides in pertinent part:

* * * * *

(b) Any person who receives compensation for removal costs or damages or claims pursuant to this [Act] shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from reciving compensation for the same removal costs or damages or claims as provided in this [Act].

(c) Except as provided in this [Act], no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this [title] [42 U.S.C. 9601-9615]. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

Spill Fund

Section 9a of Spill Fund, as amended, N.J. Stat. Ann. § 58:10-23.11h (West 1982), provides in pertinent part:

> There is hereby levied upon each owner or operator of one or more major facilities a tax to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances. * * *

Section 10 of Spill Fund, N.J. Stat. Ann. § 58:10-23.11i (West 1982), provides in pertinent part:

> The New Jersey Spill Compensation Fund is hereby established as a nonlapsing, revolving fund in the Department of the Treasury to carry out the purposes of this act. The fund shall be credited with all taxes and penalties related to this act. * * *

Section 16 of Spill Fund, N.J. Stat. Ann. § 58:10-23.11*o* (West 1982), provides in pertinent part:

> Moneys in the New Jersey Spill Compensation Fund shall be disbursed by [its] * * * administrator for the following purposes and no others:
>
> (1) Costs incurred under section 7 of this act [N.J. Stat. Ann. § 58:10-23.11f]; [1]
>
> (2) Damages as defined in section 8 of this act [N.J. Stat. Ann. § 58:10-23.11g]; [2]
>
> (3) Such sums as may be necessary for research on the prevention and the effects of spills of hazardous substances on the marine environment and on the development of improved cleanup and removal operations as may be appropriated by the Legislature; provided, however, that such sums shall not exceed the amount of interest which is credited to the fund;
>
> (4) Such sums as may be necessary for the boards, general administration of the fund, equipment and personnel costs of the department and any other State agency related to the enforcement of this act as may be appropriated by the Legislature.

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[1] The "costs" described in N.J. Stat. Ann. § 58:10-23.11f are those incurred for "hazardous substance" removal undertaken or arranged by the New Jersey Department of Environmental Protection.

[2] The "damages" described in N.J. Stat. Ann. § 58:10-23.11g include but are not limited to five categories of damages caused by the "discharge" of a "hazardous substance," namely: costs of restoring, replacing, or repairing damaged real or personal property; costs of restoration or replacement of natural resources; loss of income or earning capacity attributable to property damage; loss of state and local tax revenue attributable to property damage; and interest on loans obtained by a claimant to ameliorate the adverse effects caused by a discharge.

(5) Such sums as may be appropriated by the Legislature for research and demonstration programs concerning the causes and abatement of ocean pollution; provided, however, that such sums shall not exceed the amount of interest which is credited to the fund.

STATEMENT

1. In 1977, the State of New Jersey enacted the Spill Compensation and Control Act (Spill Fund), N.J. Stat. Ann. § 58:10-23.11 *et seq.* (West 1982), to deal with oil spills, toxic waste sites, and other discharges of hazardous substances. An excise tax was imposed on major petroleum and chemical facilities. N.J. Stat. Ann. § 58:10-23.11h. Revenue from the tax was placed in a fund and could be used for five purposes: (1) the removal or cleanup by the state of hazardous substances (N.J. Stat. Ann. §§ 58:10-23.11*o*(1), 58:10-23.11f); (2) payment of damages sustained and cleanup costs incurred by other parties as a result of the discharge of hazardous substances (N.J. Stat. Ann. §§ 58:10-23.11*o*(2), 58:10-23.11g); (3) research on the effects of spills and improved cleanup operations (N.J. Stat. Ann. § 58:10-23.11*o*(3)); (4) administrative and personnel costs (N.J. Stat. Ann. § 58:10-23.11*o*(4)); and (5) research on ocean pollution (N.J. Stat. Ann. § 58:10-23.11*o*(5)). The fund was made "strictly liable * * * for all cleanup and removal costs and for all direct and indirect damages." N.J. Stat. Ann. § 58:10-23.11g(a). Dischargers, in turn, were made strictly liable, within limits, to the fund. N.J. Stat. Ann. § 58:10-23.11g(b) and (c).

2. In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (Superfund), 42 U.S.C. 9601 *et seq.*, to deal with problems created by hazardous substances. A fund was created, financed primarily by a federal excise tax (which is set to expire on September 30, 1985) on petroleum and specified hazardous chemicals. Money from this fund may be used to pay for the removal of hazardous wastes and longer term remedial action[3] (§ 111(a)(1), 42 U.S.C. 9611(a)(1)), for certain additional governmental costs (§ 111(a)(4), 42 U.S.C. 9611(a)(4)), and for the payment of two types of "claims": "claims" for response costs incurred by any other person in accordance with a federal plan (§ 111(a)(2), 42 U.S.C. 9611(a)(2)) and "claims" for some types of environmental damage asserted by certain government entities (§ 111(a)(3), 42 U.S.C. 9611(a)(3)). Superfund also contains a preemption provision (§ 114, 42 U.S.C. 9614) that is the subject of this litigation.

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[3] "Removal" involves cleanup, whereas " 'remedial action' means those actions consistent with permanent remedy." See § 101(23) and (24), 42 U.S.C. 9601(23) and (24). These activities are described collectively as "governmental response" activities. § 101(25), 42 U.S.C. 9601(25).

"[G]overnmental response" activities must be "consistent with" the National Contingency Plan as periodically published by the Environmental Protection Agency (§§ 104(a)(1), 105, 42 U.S.C. 9604(a)(1), 9605; 40 C.F.R. Pt. 300; *National Oil and Hazardous Substances Pollution Contingency Plan: Proposed Rule*, 50 Fed. Reg. 5862 (1985)). A required component of the National Contingency Plan is the National Priorities List of hazardous waste sites to be targeted for governmental response (§ 105(8)(B), 42 U.S.C. 9605(8)(B); 49 Fed. Reg. 37070 (1984)).

Removal actions, in the absence of special findings, "shall not continue after" $1 million from the trust fund has been obligated for this purpose or six months have passed. Remedial actions must be preconditioned; the state in which remedial action is desired must first enter into a contract or cooperative agreement with the United States and, among other things, agree to pay at least 10% of the cost. § 104(c)(3)(C) and (d)(1), 42 U.S.C. 9604(c)(3)(C) and (d)(1). Such remedial action must conform to the National Contingency Plan (§ 104(c)(4), 42 U.S.C. 9604(c)(4)). The Plan in turn, establishes that trust-fund-financed remedial actions will only be authorized at sites on the National Priorities list (40 C.F.R. 300.68(a); 50 Fed. Reg. 5869 (1985)). Currently, 85 sites in New Jersey are on the National Priorities List with another 10 proposed. Nevertheless their inclusion does not guarantee receipt of trust-fund moneys (47 Fed. Reg. 31180, 31187 (1982)).

3. Appellants are corporations that have paid the New Jersey Spill Fund tax since 1977. They contend that Superfund preempted any state tax used "to pay compensation for claims and costs which may be compensated under Superfund" (J.S. 7).

The present suit is at least the fourth brought to test the continued validity of the Spill Fund tax. The appellants in this case first brought suit in the United States District Court for the District of New Jersey seeking a declaratory judgment of preemption, but their suit was dismissed and the dismissal was affirmed on jurisdictional grounds. *Exxon Corp.* v. *Hunt*, 683 F.2d 69 (3d Cir. 1982), cert. denied, 459 U.S. 1104 (1983). New Jersey likewise brought suit in the United States District Court for the District of Columbia seeking a declaratory judgment that its tax was valid. This suit was dismissed for lack of a case or controversy because no federal enforcement action had been initiated or threatened. *New Jersey* v. *United States*, 16 Env't Rep. Cas. (BNA) 1846 (D.D.C. 1981).

Meanwhile, a member of the New Jersey legislature and others initiated a third declaratory judgment action against the federal government in the District of New Jersey. This suit was settled pursuant to an agreement stipulating that Superfund did not preclude New Jersey from spending Spill Fund monies for seven purposes. *Lesniak* v. *United States*, 17 Env't Rep. Cas. (BNA) 1455, 1456 (D.N.J. 1982).[4]

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[4] In the stipulation of settlement, the government agreed that Section 114(c), 42 U.S.C. 9614(c), did not preclude New Jersey from spending Spill Fund monies "collected pursuant to N.J. Stat. Ann. § 58:10-23.11 *et seq.*" for the following purposes (17 Env't Rep. Cas. (BNA) at 1456):

(1) to finance the removal of a petroleum discharge;

(2) to finance the administrative costs of the New Jersey Spill Compensation Fund;

(3) to finance the purchasing or prepositioning of hazardous substance response equipment and to finance other preparations for responding to releases which affect the State of New Jersey;

(4) to finance the State share, if any, of the cost of response activities conducted pursuant to CERCLA to respond to a release of a hazardous substance;

(5) to compensate claims for the cost of restoration and replacement of any natural resources damaged or destroyed by a release of a hazardous substance;

(6) to advance funds to remove or remedy releases of hazardous substances eligible to be financed by the CERCLA Hazardous Substance Response Fund (hereinafter "Response Fund") if a written commitment for financing by the Response Fund has been issued by an authorized representative of the United States Environmental Protection Agency; and

(7) to compensate damage claims and to remove or remedy releases of hazardous substances eligible to be financed by the Response Fund but for which no federal reimbursement from the Response Fund is provided.

4. In August 1981, appellants commenced this suit in the New Jersey Tax Court against the State of New Jersey and various state officials seeking both a declaratory judgment of preemption and the return of all monies paid into Spill Fund since Superfund was enacted. On cross-motions for summary judgment, the tax court held that the state tax was not preempted by Superfund (J.S. App. 47a). The court first held (*id.* at 72a) that the preemption provision of Superfund allowed state taxation "to be used to pay hazardous waste cleanup costs and related claims not covered or actually compensated under super fund." The court then held in the alternative (*id.* at 72a) that "[e]ven if it were found that industry-supported tax monies could not be collected for general containment, cleanup and remedial purposes," the spill fund law still encompassed nonpreempted areas "more than sufficient to sustain its continued validity" under principles of severability (*id.* at 77a).

The Appellate Division of the Superior Court affirmed (J.S. App. 37a, 39a; 190 N.J. Super. 131 (1983)). The

majority adopted the Tax Court's opinion without elaboration.[5] A concurring opinion contended that Congress could not constitutionally "preempt New Jersey's taxation provision if it so intended" (J.S. App. 41a).

On certification, the New Jersey Supreme Court likewise held that the Spill Fund tax was not preempted. Like the tax court, the state Supreme Court held (J.S. App. 36a) "that the Spill Fund tax imposed on [appellants] is not preempted by section 114(c) of Superfund insofar as Spill Fund is used to compensate state hazardous-waste cleanup costs and related claims that are either not covered or not actually paid under Superfund."

DISCUSSION

We cannot agree with the analysis or conclusions of either party or the lower courts in this case. In our view, New Jersey's Spill Fund Tax is partially preempted as explained herein.

1. In inquiring whether the preemption provision of Superfund, § 114(c), 42 U.S.C. 9614(c), affects the New Jersey Spill Fund, we begin with the language of the federal statute. Both of the parties and the courts below appear to have misread this statutory language. Section 114(c) of Superfund provides in pertinent part:

> Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter.

a. At the outset, it should be noted that, contrary to the contention of appellants and indeed to certain statements in the legislative history,[6] Section 114(c) is much

[5] In addressing a separate consolidated appeal, the Appellate Division held (J.S. App. 40a) that the Spill Fund regulations adopted by the State's Treasury Department were invalid for procedural reasons. The validity of these regulations was not further litigated in subsequent phases of this case.

[6] See 1 Library of Congress, Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess., *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), Public Law 96-510*, at 732 (Comm. Print 1983) [hereinafter cited as *Leg. Hist.*].

more than a prohibition of "double taxation." Section 114(c) states unambiguously that "[e]xcept as provided in [Superfund], *no person* may be required to contribute to" a certain type of fund (emphasis added). This means that Section 114(c) applies to all taxpayers, not just corporations and not just those oil and chemical companies taxed under Superfund. Appellants are thus flatly wrong in stating (J.S. 8) that Section 114(c) forbids the imposition of certain taxes "on a limited class of persons."

b. The validity of requiring a contribution to a "fund" is judged under Section 114(c) by the "purpose" of the fund. We assume that Congress, in employing this term, did not intend to require an examination of legislative motive and that the "purpose" of the fund is to be judged by, and is in effect the same thing as, the use to which the fund's money may be put. Accordingly, what is prohibited by Section 114(c) are certain statutorily authorized uses of the fund's money.

Congress's choice of the term "purpose" presents an additional problem since a fund financed by a state tax may have multiple "purposes" or uses. There are three possible answers to this problem. First, Congress might have intended to preempt a state tax in its entirety if any one of its purposes or uses is impermissible. This construction, however, would be contrary to the rule, derived directly from basic principles of federalism, that state legislation is invalid under the Supremacy Clause only if and only "to the extent that it actually conflicts with federal law." *Pacific Gas & Electric* v. *Energy Resources Commission*, 461 U.S. 190, 204 (1983); see also *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

The opposite construction—that the state tax is valid if any of its purposes is permissible—would run afoul of the same rule. It would allow a state law to stand even though it remained in partial conflict with federal law.

The third possible construction therefore seems to us the correct one. Under this interpretation, a state tax is invalid only to the extent that its purposes are impermissible. In other words, Section 114(c) prohibits a state from permitting money from any tax-supported fund to be spent for certain purposes or uses. Of course, if some but not all of these purposes or uses are invalid under Section 114(c), a question may be raised whether the remainder of the state law can stand. Such a question would be presented if the remaining permissible uses of money in a tax-supported fund were dwarfed by the revenue raised by the tax. But this would be an ordinary question of severability to be decided by the state courts based on all the available evidence regarding the intent of legislature, including the presence in the state statute of a severability clause. See J.S. App. 75a.

c. We now turn to the crux of this case: the uses to which fund money may not be put. There are two such uses. The first is "to pay compensation for claims of any costs of response or damages." The second is "to pay compensation for * * * claims which may be compensated under this subchapter." Both parties (see J.S. 8; Mot. to Dis. or Aff. 16) and the New Jersey courts (J.S. App. 22a, 60a) have assumed that Section 114(c)'s prohibition applies only to claims that "may be compensated under [Superfund]," but that is not a plausible interpretation of the statutory language. The clause "which may be compensated under [Superfund]" does not modify the phrase "claims for any costs of response or damages." If it did, Section 114(c) would have to be read as though it prohibited the use of fund money

> to pay compensation for claims for any costs of response or damages [which may be compensated under this subchapter] or claims which may be compensated under this subchapter.

Such a provision would be absurdly redundant. Moreover, under standard usage, the placement of the clause rules out that construction.

Nor does it seem possible to conclude that "costs of response," "damages," and "claims" are in parallel. Under this construction, a state would be preempted from paying

> compensation for claims for [a)] any costs of response or [b] damages or [c] claims [any of] which may be compensated under this subchapter.

The statute would again be redundant because it would speak of "claims for * * * claims which may be compensated."

d. On the other hand, it seems to us that the parties and the state courts failed to recognize the significantly narrowing effect of the statutory terms "claims" and "compensation." As we have seen, Section 114(c) is not limited in two ways assumed by the parties and the lower courts: it is not restricted to oil and chemical companies taxed under Superfund; it also is not limited to payments that "may be compensated under [Superfund]." But it does not follow that Section 114(c) has a very broad reach. The critical fact is that Section 114(c)'s prohibition *is* restricted to only those payments made as "compensation for claims."

The term "claim" is defined in Superfund as "a demand in writing for a sum certain" (42 U.S.C. 9601(4)). The term "compensation" is not defined by the statute but is customarily used to mean "indemnification; * * * making whole; giving an equivalent or substitute of equal value [;] [t]hat which is necessary to restore an injured party to his former position." *Black's Law Dictionary* 256 (5th ed. 1979); see also *Webster's Third New International Dictionary* 463 (1976). The terms "claim" and "compensation" as used in Superfund are related; Superfund defines a "claimant" as "any person who presents a *claim* for *compensation* under this chapter" (42 U.S.C. 9601(5) (emphasis added)).

From these definitions, it follows, in our view, that the critical phrase "compensation for claims" in Section 114(c) refers only to demands made upon a state by

third parties seeking to be made whole. The term does not encompass expenditures or payments made by a state in the absence of such a demand. For example, if a state simply decides to spend fund money—*e.g.*, to remove or treat hazardous wastes—it is not paying "compensation" for a "claim." No "written demand for a sum certain" will have been presented. And in many cases no one will be indemnified or made whole.

Other provisions of Superfund strongly support this interpretation. In Section 111(a), 42 U.S.C. 9611(a), the key portion of the statute specifying the four permitted uses of Superfund money, Congress drew precisely this distinction between payment of "claims" and other government expenditures. Two of the permitted uses of Superfund money are described as the "payment" of "claim[s]." § 111(a)(2) and (3), 42 U.S.C. 9611(a)(2) and (3). Both involve written demands either for damages or reimbursement for moneys spent in response (§ 111(a)(2) and (3), 42 U.S.C. 9611(a)(2) and (3)). The other two permitted uses of Superfund money involve expenditures made without such a written demand for damages or reimbursement. § 111(a)(1), (4), 42 U.S.C. 9611(a)(1) and (4). These are "payment of governmental response costs" (§ 111(a)(1), 42 U.S.C. 9611(a)(1))—*i.e.*, payments made for the cleanup or removal of hazardous substances or for remedial action—and payments for necessary studies, investigations, equipment, and employee health (§ 111(a)(4), 42 U.S.C. 9611(a)(4)). Congress pointedly did not describe these expenditures as "claims."

Superfund also contains a detailed section on "claims procedure[s]." § 112, 42 U.S.C. 9612. These procedures clearly apply only to "claims" as described above and not to removal or remedial actions undertaken by the federal government itself.

2. The legislative history of Superfund unmistakably points to the same interpretation. This history shows that the key statutory phrase "compensation for claims" was

used in its customary, literal sense and not as a synonym for broader terms such as payments or expenditures.

The bill ultimately enacted as Superfund (S. 1480, 96th Cong., 1st Sess. (1979) (1 *Leg. Hist.* 155-192))[7] had no preemption provision as originally introduced. On the contrary, Section 8 expressly disclaimed any preemptive intent. The preemption provision enacted as Section 114(c) can be traced to two related bills.

a. The first (H.R. 85, 96th Cong., 1st Sess. (1979) (2 *Leg. Hist.* 474-524)) dealt exclusively with oil spills. Cast in the mold of other hazardous substances bills introduced in the 96th Congress, H.R. 85 imposed strict liability for spills (§ 104(a)), created a fund financed by a fee on oil (§ 102), and permitted injured parties to make "claims" against the fund for a broad range of economic damages (§ 103(a)). This scheme of liability and compensation was intended to be exclusive and to preempt the existing patchwork of state statutes. Unclear and often conflicting state laws were thought to threaten the insurability and efficient operation of interstate carriers. See 2 *Leg. Hist.* 469-470 (remarks of Rep. Biaggi, the sponsor), 528-529 (report of Merchant Marine and Fisheries Committee). Accordingly, Section 110(a)(2) provided that "no person may be required to contribute to any [other] fund, the purpose of which is to compensate for" the losses claimable against the federal fund (2 *Leg. Hist.* 513). H.R. 85 was passed by the House but died in the Senate (1 *Leg. Hist.* VI; 2 *Leg. Hist.* 1015).

The legislative history of H.R. 85 makes abundantly clear that this provision did not apply broadly to state payments or expenditures relating to oil spills, but was limited to the payment of victims' claims for "compensation." The House Merchant Marine and Fisheries Committee wrote (2 *Leg. Hist.* 532 (emphasis added)):

> States may establish a fund to purchase pollution abatement equipment, or a fund for the prevention,

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[7] 1 *Leg. Hist.* stands for volume one of the legislative history compiled by the Congressional Research Service. See note 6, *supra*.

> detection, or observation of pollution, such as environmental monitoring or research programs. * * * The States would be prohibited only from duplicating the basic purposes of the Federal fund; that is, to provide a source of *compensation for those who have been victimized by oil pollution* and the related evidence of financial responsibility.

See also 2 *Leg. Hist.* 562 ("[N]o one may be required to contribute to any other fund" the purpose of which is "to compensate those who suffer one or more of the [specified] economic losses."); 2 *Leg. Hist.* 621-622 (report of House Comm. on Public Works and Transportation).

This point was emphasized even more strongly during a colloquy between the bill's sponsor, Representative Biaggi, and Representative Florio of New Jersey, who expressed concern about the bill's possible effect on New Jersey's Spill Fund (2 *Leg. Hist.* 904 (emphasis added)):

> MR. BIAGGI: * * * The purpose [of section 110] is to prohibit States from creating duplicate funds to pay damage compensable under H.R. 85.
>
> MR. FLORIO: However, there is no such preemption of a State's ability to collect such taxes or fees *for other costs associated with spills and discharges of oils and hazardous substances that are not compensable damages as defined in this legislation* or that do not occur in or threaten the navigable waters of the United States.
>
> MR. BIAGGI: The gentleman is correct.
>
> MR. FLORIO: There is nothing in the language or intent of H.R. 85, section 110 or elsewhere in the bill which would prohibit a State from *responding to a spill or discharge* either under agreement with the Secretary, at the direction of the Federal on-scene coordinator or in the absence of timely response by any other party. * * *.
>
> MR. BIAGGI: Yes, the gentleman understands the intent of the bill correctly.

Representative Biaggi reiterated (2 *Leg. Hist.* 905 (emphasis added)) that a "State cannot receive a fee or a tax on oil if that fee or tax is to go into a fund and the

fund is for *the purpose of paying oilspill damage claims*" but that a State was not prohibited "from imposing fees or taxes *for other purposes* connected with oil spills." See also 2 *Leg. Hist.* 906 (remarks of Reps. Snyder and Biaggi); 2 *Leg. Hist.* 919-920 (remarks of Rep. Livingston); 2 *Leg. Hist.* 924 (remarks of Rep. Snyder).

b. The second related bill was the Administration's proposal, S. 1341, 96th Cong., 1st Sess. (1979) (3 *Leg. Hist.* 24-60), which dealt both with spills of hazardous substances and hazardous waste disposal sites. For spills, it established a system of notification, emergency response, liability, and economic compensation. For disposal sites, it established essentially the same program but without compensation. The bill created a fund financed by an excise tax on petrochemical feedstocks and specified chemicals (§ 606) and allowed parties injured by spills to file "claims for damages" for a broad range of "economic loss[es]" (§ 607). This compensation scheme, like H.R. 85's, was intended to be comprehensive and exclusive within its limited sphere (1 *Leg. Hist.* 124). Accordingly, the bill prohibited suits in federal or state court "for an economic loss or cost * * *, a claim for which may be asserted under [the bill]." (§ 612(a)(1). 3 *Leg. Hist.* 57). In addition, the bill provided that "no person may be required to contribute to any fund, the purpose of which is to pay compensation for such a loss or cost" (§ 612(a)(2)).

c. S. 1480, which became Superfund, resembled these bills in many particulars while differing in others. It imposed strict liability for the release of hazardous substances (§ 4), created a fund financed in part by a fee on hazardous substances and wastes (§ 5), and authorized the use of fund money both for government removal and remedial actions and for the "payment of any claim for costs of removal or damages" that could not be recovered from the responsible party (§ 6). The bill was later altered to permit payment of a long list of enumerated "claims" (1 *Leg. Hist.* 225-226).

As previously noted, S. 1480 originally lacked a preemption provision. Numerous amendments adding such a provision were unsuccessfully attempted. Several resembled Section 114(c) and the preemption provisions in H.R. 85 and S. 1341.[8] For example, Amendment No. 1958 provided (3 *Leg. Hist.* 107):

> No person may be required to contribute to any fund, by any Federal, State, or other law, the purpose of which is to pay compensation for any loss which may be compensated under this title.

Similarly, Amendment No. 2387 stated (3 *Leg. Hist.* 185):

> (1) No action may be brought in any court of the United States, or of any State or political subdivision thereof, for costs or damages for which a claim may be asserted under this Act, and
>
> (2) no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for such costs or damages * * *.

On November 18, 1980, S. 1480 was reported out of committee. The ensuing events have been summarized by the Congressional Research Service (1 *Leg. Hist.* VII):

> In the meantime, of course, the national elections had taken place on November 4 and subsequent events during the lame-duck session were colored by the fact that the Republicans would become the majority party in the Senate in 1981. It was not at all clear, however, what impact that would have on the Superfund legislation.
>
> As reported, S. 1480 called for creation of a $4.1 billion fund. On November 14, the likely incoming chairman of the Environment Committee, Senator Stafford, announced that he and committee chairman Randolph were introducing a $2.7 billion compromise (Amendment No. 2622.) But when it was called to the Senate floor on November 20, objection to its consideration was voiced. A motion to table the bill

[8] One proposed amendment (No. 1965) introduced by Senator Gravel of Alaska would have provided the scope of preemption sought by appellants (see 3 *Leg. Hist.* 142). It was not adopted.

> (which would have killed it) lost by 29-50. It was then withdrawn and new concessions were made by its sponsors; the fund was cut to $1.6 billion and the provision compensating victims of environmental disasters for their medical expenses was deleted (Amendment No. 2631). On November 24, this version passed by a 78-9 vote, its provisions were substituted for the language of H.R. 7020, and the resulting bill was returned to the House.
>
> * * * * The House agreed to the Senate amendments on December 3 by a 274-94 vote, and the President signed it into law on December 11, 1980.

Among the changes made by the eleventh-hour floor amendment was the addition of Section 114(c). Whatever grounds for uncertainty may exist may exist in other respects as to the intended reach of this provision, there can be no real doubt that the key statutory phrase "compensation for claims" was used in its customary, literal sense, just as the terms "claim" and "compensation" had been employed in the predecessor bills and amendments. The most elucidating portion of the debate was the colloquy between Senator Bradley of New Jersey, who was concerned about the survival of New Jersey's Spill Fund, and the Committee Chairman, Senator Jennings Randolph. Neither Senator Bradley's questions nor Senator Randolph's answers were extemporaneous; indeed, their exchange was almost a verbatim duplication of that between Representatives Florio and Biaggi regarding H.R. 85. See page 17, *supra*. The Senators' colloquy was as follows (1 *Leg. Hist.* 731-732 (emphasis added)):

> MR. BRADLEY: * * * Am I correct in understanding that it is the purpose of this legislation to prohibit States from requiring any person to contribute to a fund *for the purpose of reimbursing claims already provided for in this legislation?*
>
> MR. RANDOLPH: Yes, that is the clear intent. The purpose is to prohibit States from creating duplicate funds to pay *damage compensable under this bill.*
>
> MR. BRADLEY: *However, there is no such preemption of a State's ability to collect such taxes or fees for other costs associated with releases that are*

not compensable damages as defined in this legislation.

MR. RANDOLPH: The Senator is correct.

MR. BRADLEY: There is nothing in the language or intent of this bill which would prohibit a State from *responding to a release* either under agreement with the Secretary, at the direction of the Federal on-scene coordinator or in the absence of timely response by any other party. In fact, the Federal Government's cleanup and containment capability is viewed as something of an appeal of last resort in the absence of any other adequate and timely response, if my understanding is correct.

MR. RANDOLPH: Yes, the Senator understands the intent of the bill correctly. * * *

After S. 1480 was passed by the Senate and its language was substituted for that in the House bill (H.R. 7020, 96th Cong., 1st Sess. (1979), Representative Florio, the sponsor of the House bill, observed (1 *Leg. Hist.* 780):

> Regarding the preemption language contained in these amendments, I would point out that some States, including my own State of New Jersey, have successful spill funds and that while States may not create duplicate funds *to pay damages compensable under this bill, there is no preemption of the State's ability to collect taxes or fees for other costs associated with releases that are not compensable damages as defined in this legislation.* It is also intended that State funds can be used to provide the required 10-percent State match.

See also 1 *Leg. Hist.* 777 (remarks of Rep. Florio).

d. In view of this history, as well as the plain meaning of the statutory language, we do not think it is possible to argue that Section 114(c) preempts anything other than payments made in response to formal demands upon a state fund by parties seeking to be made whole for damages[9] or costs attributable to the release of a

[9] The term "damages" is defined in Section 101(6) of Superfund, 42 U.S.C. 9601(6) as "damages for injury or loss of natural resources."

hazardous substance. Expenditures made by a state for any other purposes, including removal or remedial action, whether undertaken alone or in cooperation with the federal government, are not preempted. Thus, a state's payment of its 10% share of the cost of remedial action undertaken pursuant to Superfund is not affected by Section 114(c).[10] The federal government does not obtain this money from the state by means of a "written demand for a sum certain." Nor is the federal government seeking to be "compensated" or "made whole." On the contrary, the state must agree to provide this money before any expenditures are made (§ 104(c)(3), 42 U.S.C. 9604(c)(3)). The money does not represent "compensation" for the federal government but rather the state's share in the "cooperative" remedial undertaking (§ 104(c)(3), 42 U.S.C. 9604(c)(3)).[11]

3. The remaining question is the application of Section 114(c), as properly construed, to the New Jersey Spill Fund. As noted, Spill Fund money may be used for five purposes: (1) the removal or cleanup by the state of hazardous substances (N.J. Stat. Ann. 58:10-23.11*o*(1) § 58:10-23.11f); (2) damages sustained and cleanup costs incurred by other parties as a result of the discharge of hazardous substances (N.J. Stat. Ann. § 58:10-23.11*o*(2) § 58:10-23.11g); (3) research on the effects of spills and improved cleanup operations (N.J. Stat. Ann. § 58:10-23.11*o*(3)); (4) administrative and personnel costs (N.J. Stat. Ann. § 58:10-23.11*o*(4)); and (5) research on ocean pollution (N.J. Stat. Ann. § 58:10-23.11*o*(5)).

[10] See note 3, *supra*. See 1 *Leg. Hist.* 733:

> MR. BRADLEY: Am I correct in assuming that moneys expended by State funds can be used to provide the required 10 percent State match?
>
> MR. RANDOLPH: That is correct.

See also 1 *Leg. Hist.* 780 (remarks of Rep. Florio); page 22, *supra*.

[11] Bills favorably reported by the responsible House and Senate committees have proposed deletion of Section 114(c). See H.R. Rep. 98-890, 98th Cong., 2d Sess. Pt. 1, at 58-59 (1984). S. Rep. 99-11, 99th Cong., 1st Sess. 59-60 (1985).

One of these uses—the payment of other parties' damages and cleanup costs—appears to constitute the payment of "compensation for claims" within the meaning of Section 114(c) of Superfund. And such payments may fall within the statutory definitions of "costs of response" (*i.e.*, removal or remedial action)[12] or "damages."[13] The remaining four uses of Spill Fund money appear to be permitted.[14]

Because one of the five uses of Spill Fund money appears to be partially prohibited by Section 114(c), appellants are presumably entitled to a declaratory judgment that Spill Fund is preempted to that limited extent. Whether appellants are entitled to any other relief, such as invalidation of the entire tax on non-severability grounds or the return of tax monies, should be left for the state courts on remand.

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[12] § 101(23)-(25), 42 U.S.C. 9601 (23-25).

[13] § 101(6), 42 U.S.C. 9601(6). As noted above (see note 9, *supra*), the term "damages" under Superfund means natural re- note 9, *supra*), "damages" under Superfund means natural resource damages. The New Jersey Spill Fund Act authorizes payment of claims for a wider array of damages. In our view, Section 114(c) preempts use of Spill Fund money only for the payment of "damages" as defined in Superfund, *i.e.*, natural resource damages.

[14] According to New Jersey's submission (Motion to Dismiss or Affirm 10 n.*), since the enactment of Superfund, no Spill Fund money has been spent to pay third-party claims for damages or cleanup costs.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted. The judgment of the Supreme Court of New Jersey should be reversed in part and the case remanded for further proceedings.

Respectfully submitted.

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MAY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10224